SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1011

ARMORED CARRIER CORPORATION,

Appellant,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Appellees,

—and—

B.D.C. CORPORATION,

Intervening Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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Pursuant to Paragraph 3 of Rule 16 of the Rules of this Court, Armored Carrier Corporation, files this brief in opposition to the Motion to Affirm the Judgment of the District Court.

ARGUMENT

The argument in support of the Motion to Affirm is based upon the proposition that an administrative agency has fully discharged its responsibilities under a statute

requiring a finding of fitness so long as the agency, in its report, recites an ultimate finding that, "the applicant is fit" and alludes to some underlying facts to support that finding.

In the case at bar, the allusion is framed as follows:

> "While we do not condone applicant's past unauthorized operations we conclude that the evidence as to these operations does not require a finding of unfitness." (J.S., App. F., p. 68)

Commissioner Murphy of the ICC and Judge Bartels of the District Court, in dissenting from the decision of the ICC and the affirmance of the District Court, respectively, pointed out that this finding is inadequate because it ignored the most significant underlying fact bearing upon applicant, BDC's fitness: *wilful* violations of the law under which authority is sought.

Although BDC may have commenced unauthorized operations inadvertently, the evidence of record is clear that these operations were continued wilfully and were still continuing at the time the hearings terminated. Indeed, on the recommendation of the ICC, BDC was indicted and convicted of the crime of carrying on these operations without authority. (J.S., App. A-1, pp. 30-31, n.3)

In its decision, the ICC completely avoided making basic findings as to the wilfulness of applicant's conduct and the effect of that conduct upon applicant's fitness. Instead, it held the applicant to be fit although *unauthorized operations may inadvertently have begun.* But, of the wilful conduct with which the evidence of record is replete, not a word was said. Nor is there even an acknowledgment by the ICC that such conduct was considered in forming its decision.

Now, both BDC and ICC urge this Court to join in avoiding this issue by affirming on the ground that evidence of wilfullness does not mandate a finding of unfitness.

Assuming this to be so, Armored contends that wilful, criminal violations of the statute under which authority is sought, and perjured testimony with respect to those violations cannot be ignored by an administrative agency in determining an applicant's fitness. It is incumbent upon the ICC—as upon any other administrative agency dealing with the question of fitness—to consider and make basic findings as to the effect of such violations upon the fitness of an applicant. This it did not do.

It is submitted that this aspect of the duties of an administrative agency is in vital need of definition by the Court. If allowed to stand, the decision of the ICC, as affirmed by the District Court, in the words of Judge Bartels, "*: . . .* promotes . . . a dangerous precedent." (App. A-1, p. 26)

CONCLUSION

The motion to affirm should be denied and probable jurisdiction should be noted.

Respectfully submitted,

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